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Supreme Court
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No. 10-731

IN THE

# Supreme Court of the United States

DAVID G. WALSH, et al.,

*Petitioners*,

v.

BADGER CATHOLIC, INC., et al.,

*Respondents*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

The University of Wisconsin funds a broad variety of student expression through its mandatory student fee system. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). However, the University does not fund private student speech it determines to be prayer, worship, or religious instruction.

1. Whether the Seventh Circuit correctly held that the University violated the First Amendment by excluding otherwise permissible private expression from a forum for student speech, solely because the University deems the speech to be prayer, worship, or religious instruction.

2. Whether the Establishment Clause requires the University to single out private student religious expression for exclusion from a forum opened for student expression on all other topics.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Badger Catholic, Inc., states that it is a non-stock corporation under Wisconsin law, with no parent or publicly held company owning 10% or more of its stock.

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## STATEMENT OF THE CASE

This case concerns questions of law resolved long ago by this Court: namely, whether the government violates the Freedom of Speech Clause by selectively excluding private student expression because of its religious content and viewpoint from a speech forum, and whether the Establishment Clause requires a state university to ban otherwise permissible student speech from a forum because it determined the speech to be prayer, worship and proselytizing. Petitioners are members of the Board of Regents of the University of Wisconsin System, the System president, and officials of one of its branch campuses, the University of Wisconsin-Madison (collectively, "University"). Respondents are a recognized student organization at the University and two former students (collectively, "Badger Catholic"). The courts below held the University's policy of prohibiting the use of student activity fees for otherwise permitted activities that may include student-led prayer, worship, and proselytizing violated the First Amendment. The Petition contains an incomplete and inaccurate account of the record below.

### A. The University's Student Activity Fee Forum

The University collects a mandatory segregated university fee ("SUF") from every student each semester. Ct. of Appeals Sep. App. of Appellants ("A-Ap.") p. 173 ¶20; 300-01 ¶437. The SUF is a noninstructional fee collected in addition to tuition.

A-Ap.300-01 ¶437. It is divided into allocable and nonallocable portions. A-Ap.173-74 ¶21; 301 ¶439.

The allocable SUF pays for activities of registered student organizations ("RSOs"). A-Ap.174 ¶22; 301-02 ¶¶439-40. The purpose of the SUF is to facilitate and encourage RSO activities that address philosophical, religious, scientific, social, and political subjects. A-Ap.302-06 ¶441; Ct. of Appeals Sep. App. of Appellee ("A.") 146-207. "The speech the University [of Wisconsin] seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds." *Southworth*, 529 U.S. at 232.

However, University policy prohibits the use of SUF for any RSO activity that includes student-initiated prayer, worship, proselytizing, or inculcation of belief.[1] A-Ap.191-92 ¶94-96; 250-51 ¶239; A.130-34. The University claims the Establishment Clause requires this selective exclusion of student speech.

The University's Board of Regents, chancellors, and students share responsibility for disposition of the allocable SUF. Wis. Stat. § 36.09(5) (2011). One way the University allocates SUF to RSOs is through the General Student Services Fund ("GSSF"). A-Ap.176 ¶33; 178 ¶36; 179 ¶43. The GSSF provides operations funding to eligible RSOs.

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[1] The University refers to its policy as prohibiting "worship, proselytizing, or inculcation of a particular religious belief." Pet. 14. Because proselytizing and inculcation of a particular religious belief are synonyms, Badger Catholic simply refers to this as promoting its beliefs or evangelism.

A-Ap.179 ¶42. The Student Services Financial Committee ("SSFC"), a committee of Associated Students of Madison ("ASM," the student government), allocates the GSSF to eligible RSOs. A-Ap.178 ¶37; 199-200 ¶116. The ASM, chancellor, and Regents must approve these allocations. A-Ap.190 ¶89; 307 ¶¶444-45.

The SUF is not a "limited budget." Pet. 14. The University allocates funds to RSOs and then determines how much money it will charge each student to fund the SUF. A-Ap.178 ¶¶38-39. Thus, the funds in the SUF are not scarce; they have no preset limit.

GSSF-funded RSOs do not receive direct money payments. RSOs access their GSSF allocation through submission of purchase orders, use of the University credit card, or reimbursement of expenses incurred by individual students. University officials audit each expense before payment to determine if the use of funds complies with University policy, and state and federal law. A-Ap.200-01 ¶¶118-19, 121.

Many RSOs receive GSSF budgets and engage in a wide variety of speech (self-described by the organizations below) in accord with the University's purpose for this metaphysical forum of funding:

- Campus Women's Center provides resources to students, support and discussion groups on politics and policy, outreach programs about campus safety, and volunteers for free childcare.

- Collegians for a Constructive Tomorrow offers an internship program and brings speakers to campus.

- CALS Student Council unites student groups interested in agriculture and life sciences through picnics, leadership retreats, workshops, and educational and professional development opportunities.

- F.H. King promotes sustainable agriculture and provides internships, gardening training, and advocacy for change in food production, lectures, workshops, and outreach activities.

- Jewish Cultural Collective hosts speakers and holds campus activities using theatrical, journalistic, and musical mediums.

- LGBT Campus Center educates the campus community, provides safe spaces for students to socialize and access resources, hosts programs and social and support groups, offers peer mentoring, advocates for the needs of LGBTQ students, develops leaders, and provides speakers willing to break down the barriers of "homophobia" and "heterosexism."

- MEChA educates the campus about Chicana/o and Mexicana/o history, develops political consciousness, and holds

workshops on social justice, cultural awareness, and political consciousness.

- MultiCultural Student Coalition promotes cultural awareness through initiating administrative and political changes to address the needs of students of color and under-represented groups. It provides advertising and campaign planning, research, leadership development opportunities, and training to enhance skill development. It also facilitates meetings, engages in public speaking, teaches management skills, and increases awareness on current issues.

- Rape Crisis Center provides twenty-four hour response, campus support groups, and counseling for sexual assault victims, and educational presentations and workshops.

- Sex Out Loud promotes "healthy sexuality" through "sex positive" education and activism, distributes contraceptives, and holds awareness events.

- Student Leadership Program provides classroom learning opportunities to develop leadership skills.

- WISPIRG advocates for consumer rights, environmental protection, democracy issues, and hunger and homeless issues. It uses awareness events, leadership

training, conferences, rallies, petitions, lobbying government, and media.

- WSUM 91.7 FM is the student-run radio station.

- Wunk Sheek preserves its spiritual view and educates the community about the cultural identity of Native Americans. It provides workshops, speakers, activities, awareness, cultural experiences, powwows, and information on indigenous culture, politics, life, and history.

A-Ap.302-06 ¶441; A.146-207.

### B. The University's Exclusion of Badger Catholic's Speech

Since Badger Catholic first applied for GSSF funding, the University has singled out its religious speech for discriminatory treatment. A-Ap.201-02 ¶¶123-24. For example, in 2005, the SSFC denied several of Badger Catholic's funding requests because they were "too Catholic" and included student-led worship. A-Ap.209-10 ¶142. Former Chancellor John Wiley agreed with SSFC and wrote: "State monies cannot be used to support religious activities, per the Establishment Clause of the First Amendment to the U.S. Constitution. . . . My review has identified numerous aspects of the funding approved for the [Badger Catholic] that potentially violate this prohibition." A-Ap.213 ¶¶149-50; A.210. Eventually, Wiley approved Badger Catholic's budget, but instructed ASM and SSFC to "probe the

nature/content of programming offered by religious entities" in the future, because he was concerned about funding Badger Catholic's religious activities and instruction. A-Ap.219 ¶167; 307 ¶446; A.220.

### 1. The 2006 Litigation

In 2006, Badger Catholic sued the University for rejecting its application for RSO status and for refusing to fund some of its activities.[2] A-Ap.221-23 ¶¶174-75; 307-08 ¶¶447-48. The District Court preliminarily enjoined the University's non-discrimination policy that caused the RSO status denial. A-Ap.223 ¶176; 308 ¶449; *see Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh*, No. 06-C-649-S, 2007 WL 765255, *2 (W.D. Wis. Mar. 8, 2007).

The parties eventually settled. A-Ap.223 ¶177. Badger Catholic agreed to remove non-students from leadership, and "not seek funding for Masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy." A-Ap.223 ¶178; A.125 ¶2, 127 ¶5. The University agreed to approve Badger Catholic's 2007-08 GSSF budget, to review SUF funding requests "without reference to the religious viewpoint of the program or activity," and to review Badger Catholic's funding requests "in the same manner as it reviews the budget requests of other RSOs." A-Ap.224-25 ¶¶179-80; A. 126-27 ¶4.

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[2] At that time, both students and non-students led Badger Catholic, which used the name "University of Wisconsin Roman Catholic Foundation, Inc."

### 2. The 2007 Litigation

Less than a month after executing the settlement agreement, the University refused to fund certain portions of Badger Catholic's 2006-07 GSSF budget. A-Ap.225-28 ¶¶181-88. A series of meetings initiated by the University followed. During the meetings, University officials identified several of Badger Catholic's 2006-07 budget items that they believed violated the Establishment Clause, including Lenten booklets, rosary pamphlets, the Busy Person's Retreat, a drum shield for the Alpha Omega band, and the Evangelical Catholic Institute. A-Ap.230 ¶196; A-Ap.231 ¶200. These activities were part of Badger Catholic's approved GSSF budget. Badger Catholic students had already spent the money expecting the University to approve the expenses, but the University refused. A-Ap.231 ¶201. University officials refused to release SUF funds for any activities that involved what the University determined to be student-led prayer, worship, "proselytizing," or the inculcation of values. A-Ap.230-31 ¶¶198-99.

Instead of relying on the descriptions of these expenses detailed in Badger Catholic's GSSF funding application, University officials—following Chancellor Wiley's directive—probed the nature and purpose of each activity by asking detailed questions of Badger Catholic's student leaders. The University expressed concern about activities that included what the University determined to be student-led prayer, worship, and "proselytizing," A-Ap.241-42 ¶221, but could not identify how much prayer, worship, and "proselytizing" in an activity would

cause the withholding of funds, A-Ap.196 ¶¶107-08; 197-99 ¶¶111-13; 250-51 ¶239.

During the last meeting, the University detailed each activity it refused to fund. In Badger Catholic's 2006–07 budget, it refused to fund: the drum shield for the Alpha Omega band, the Evangelical Catholic Institute, and the Busy Persons Retreat. A.130-34, 138-39; A-Ap.244 ¶226; 245-48 ¶230; 309 ¶453. In the 2007–08 budget, it refused to fund: the Evangelical Catholic Summer Training Camp, Samuel Group, Mentoring for Busy Students, Evangelical Catholic Ministry Institute, rosary booklets, Lenten booklets, and Alpha Omega. A.130-34, 140; A-Ap.244-45 ¶227; 245-48 ¶230; 249 ¶234; 310 ¶454; 314 ¶463.

Each activity the University refused to fund is similar in nature – in secular terms – to funded expressive activities of other RSOs. The Evangelical Catholic Institute was a leadership training program conducted from a Catholic perspective. Badger Catholic's budget included expenses for printing costs, speaker honoraria, transportation, lodging and board, and newspaper advertisements in the student newspaper. Contrary to Petitioner's implication, Pet. 7, the budget did not include funding for Masses or praise and worship programs, though those activities did take place. A-Ap.234-36 ¶207; 312-14 ¶460.

The Busy Persons Retreat (i.e., Mentoring for Busy Students) provided students with the opportunity to meet with a spiritual counselor for career, personal, spiritual, and educational

mentoring and counseling. Some of the counselors were nuns and priests. Badger Catholic's budget included funding for the services and meals of these counselors. Voluntary prayer occurred during portions of the activity. A-Ap.234 ¶206; 311 ¶457.

Alpha Omega was a weekly large group meeting that included speakers, music, and time for students to socialize and interact with one another. Badger Catholic's budget included funding for a drum shield for the student band that played music during the meeting. A-Ap.236-37 ¶208; 310-11 ¶456.

The Evangelical Catholic Summer Training Camp served as a leadership training event for students. The budget expenses included registration fees for students. The activity included elements of prayer, worship, and proselytizing. A-Ap.310 ¶455.

Samuel Group was a counseling program offered by Badger Catholic for students who wanted to regularly meet with a counselor in order to determine their vocation. Students operated the program and nuns provided guidance, prayer, and vocational discernment, including advice on what academic major to pursue. A-Ap.312 ¶459.

Badger Catholic's budget included funds to purchase Rosary booklets, which it offered to University students who wanted to learn more about the Rosary prayer and how to pray it. A-Ap.314 ¶462.

The University refused to fund expenses related to these activities (and cautioned Badger Catholic

that other activities were borderline) because they included some amount of what the University concluded was student-led prayer, worship, or "proselytizing." In response, Badger Catholic commenced litigation.

### C. The District Court's Decisions

After filing suit, Badger Catholic moved for a preliminary injunction against the University's policy, which the District Court (Shabaz, J.) granted on January 17, 2008. The court enjoined the University from "enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or involve religious speech considered prayer, worship and/or proselytizing." App. 82-83a. In so ruling, the court noted this case is "undistinguishable from *Rosenberger* [*v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)]," App. 76a, and rejected the University's sole defense: that the Establishment Clause justified its policy, App. 77-78a.

The parties cross-moved for summary judgment. On September 24, 2009, the District Court (Adelman, J.) declared the University's policy unconstitutional in violation of the First Amendment. App. 54-55a, 61-62a. The District Court rejected the University's sole defense of its policy and held that it does not violate the Establishment Clause to provide SUF funding to students expressing religious viewpoints in a public forum. App. 47a. The court also held the

University's policy was unreasonable in the limited public forum because the University used abstract characterizations to label activities as prayer, worship, and proselytizing instead of determining whether the specific activities serve the purposes of the forum. App. 49a, 54-55a. The court entered a declaratory judgment that the "University may not categorically exclude worship, proselytizing or sectarian instruction from segregated fee funding unless it does so pursuant to a rationale that is reasonable in light of the purposes of the forum and viewpoint neutral." App. 62a. Thus, the University's refusal to release funds for Badger Catholic's 2006-07 and 2007-08 activities was unconstitutional.[3] App. 54-55a.

### D. The Seventh Circuit's Decision

The University appealed the District Court's decision, and Badger Catholic cross-appealed. The Seventh Circuit affirmed the declaratory judgment, in an opinion written by Chief Judge Easterbrook. The court held the University unconstitutionally discriminated against Badger Catholic's speech in violation of the First Amendment. The court, relying on this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger*, 515 U.S. 819, determined the University does not violate the Establishment Clause by funding Badger Catholic's

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[3] Badger Catholic moved the District Court to reconsider its declaratory judgment and requested it also enjoin the University's policy, order payment of funding denied to Badger Catholic, and rule on the Free Exercise Clause and Equal Protection Clause claims. The District Court refused to reconsider. App. 103a.

programs. App. 4-7a. It also found that decisions since *Rosenberger* "reinforce its conclusion that underwriting a religious speaker's costs, as part of a neutral program justified by the program's secular benefits, does not violate the Establishment Clause even if the religious speaker uses some of the money for prayer or sectarian instruction." App. 6a (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)). Although the court avoided labeling the University's policy and action as either viewpoint or content discrimination, it concluded that because the University, for example, "has chosen to pay for student-led counseling . . . its decision to exclude counseling that features prayer is forbidden under *Widmar* and its successors." App. 8a.

The court also rejected the University's new argument on appeal that even if the Establishment Clause does not prohibit it from funding Badger Catholic, under *Locke v. Davey*, 540 U.S. 712 (2004), the University is not required to do so. The court distinguished *Locke* on two grounds. First, in *Locke*, Washington's program "did not evince hostility to religion," but the University's does because it excludes religious prayer and instruction. App. 9a. Second, in *Locke*, the "state's decision []concerned how to use funds over which it retained plenary control" and ultimately was a form of government speech, so forum analysis was "simply inapplicable." *Id.* But, here, the University is not espousing its own message. It "created a public forum where the students, not the University, decide what is to be said." App. 10a.

The court recalled that the University itself "persuaded the Supreme Court [in *Southworth*] to hold that dissatisfied students are not entitled to get their student-activity fees back, precisely because the fees are used to operate a public forum in which students themselves, and not the University, decide what is to be said." *Id.* As to the University's contention that Badger Catholic's programs include too much devotional activity, the court questioned how the University "would deal with an application by a student group comprising members of the Society of Friends," as "Quakers view communal silence as religious devotion." App. 11a.

Finally, the court deferred its decision until after this Court issued *Christian Legal Society v. Martinez* ("*CLS*"), 130 S. Ct. 2971 (2010), to "see whether the Court would modify the approach [of viewpoint neutrality] articulated in *Widmar*, *Rosenberger*, and *Southworth*." App. 11a. The Seventh Circuit found that this Court did not modify that approach, as "no Justice disagreed with the proposition that 'any access barrier must be reasonable and viewpoint neutral' and that 'singling out religious organizations for disadvantageous treatment' is permissible only if the requirements of 'strict scrutiny' can be satisfied." App. 12a (citing *CLS*, 130 S. Ct. at 2984, 2987). The court also noted that *CLS* described *Widmar* as a "case holding that refusing to allow 'religious worship and discussion' in a public forum is forbidden viewpoint discrimination." App. 12a (citing *CLS*, 130 S. Ct. at 2987). Thus, the court concluded that there "can be no doubt" that the University's SUF "must cover Badger Catholic's six contested programs, if similar programs that

espouse a secular perspective are reimbursed." App. 12a.

Judge Williams dissented. She disagreed with the panel's conclusion that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debates from a religious perspective.'" App. 19a (citation omitted).

In Judge Williams' view, "Badger Catholic would only have a claim of viewpoint discrimination if the University was choosing to allocate funding for Presbyterian or Baptist or Jewish religious services but declining to fund Catholic worship services," and even if this had a disparate impact on religious groups, that would not constitute viewpoint discrimination. App. 21-22a. Ignoring record facts, she found that the forum is limited by the amount of money in the fund; thus, the University's decision to draw a line at a category such as purely religious activities is not unconstitutional. App. 22-23a.

Finally, Judge Williams agreed with the panel's conclusion that the University does not violate the Establishment Clause by funding Badger Catholic's activities, but determined the University acted constitutionally by choosing to not fund these activities. App. 27-28a.

## REASONS FOR DENYING THE WRIT

The Petition does not merit certiorari because it raises issues previously resolved by this Court in *Widmar*, *Rosenberger*, and *Southworth*. Those decisions establish that a public university must allocate student activity fees on a viewpoint neutral and reasonable basis; that the exclusion of religious expression from such a forum is not viewpoint neutral; and that the state does not violate the Establishment Clause by providing religious students equal access to the forum. The Seventh Circuit correctly applied those decisions to declare unconstitutional the University's exclusion of Badger Catholic's otherwise permissible expression just because the University considered them prayer, worship, and "proselytizing."

The Petition also asks this Court to create an unmanageable distinction between religious worship and speech from a religious viewpoint, a distinction this Court already rejected in *Widmar* and its progeny. The University is not entitled to any deference that allows it to gerrymander its SUF forum in a way that violates the First Amendment. Nor is there a conflict among the circuits on the questions presented. In fact, the circuits agree with the Seventh Circuit's decision below.

### I. The Seventh Circuit Correctly Applied *Widmar*, *Rosenberger*, and *Southworth*.

In analyzing the University's exclusions of any Badger Catholic activity deemed to include too much student-led prayer, worship, and proselytizing, the

Seventh Circuit correctly applied this Court's holdings in *Widmar*, *Rosenberger*, and *Southworth*. Those cases hold that when the government opens a public forum to encourage private student expression, it may not exclude student expression merely because of its religious content, or because it communicates religious viewpoints on permitted forum topics. Those decisions and others firmly reject the University's unprincipled and unmanageable distinction between religious worship and speech from a religious viewpoint. Thus, the University is not entitled to any discretion from this Court for its decision to exclude otherwise eligible student expression from its broad public forum simply because of the religious content of the students' speech.

### A. Exclusion of Religious Modes of Speech Communicating Religious Viewpoints on Permitted Forum Topics Violates the First Amendment.

For at least thirty years, this Court's precedent has rejected government attempts to exclude religious modes of speech from public fora. The question presented by the Petition is one this Court has answered time and again, and the Seventh Circuit correctly applied that precedent.

In *Widmar*, the University of Missouri Kansas City provided meeting facilities for student organizations, except "for purposes of religious worship or religious teaching." 454 U.S. at 265. Cornerstone, a religious student organization, desired to use the university's facilities for its

meetings, which typically included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. The university rejected Cornerstone's request. *Id.* at 265. This Court held the university created a public forum by opening its facilities and that its content-based restriction on religious worship and religious teaching was not necessary to serve a compelling state interest. *Id.* at 277. The university argued the Establishment Clause required it to reject Cornerstone's application, but the Court rejected this argument, finding that the primary effect of the forum was not to advance religion, but to advance speech. *Id.* at 273. Petitioners characterize *Widmar*'s holding as narrow and one that is silent to the permissibility of prohibiting religious worship in a limited public forum. Pet. 16. Yet Cornerstone undeniably engaged in worship and proselytizing, as it sang "hymns" and "discuss[ed] religious views," both modes of speech present in this case.

In *Rosenberger*, the University of Virginia allowed official student organizations to apply for student fee funding. However, the university prohibited the allocation of fees for "religious activities," which it defined as "any activity that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." 515 U.S. at 825 (internal quotation marks omitted). Qualified groups submitted bills to the university, which then paid directly the group's creditors upon determining the expenses were appropriate. *Id.*

Wide Awake Productions, an eligible student organization, requested funds to publish "a

magazine of philosophical and religious expression." *Id.* The mission of the magazine was to "challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. The University denied Wide Awake's request because it violated the ban on "religious activities." *Id.* at 827.

This Court held that the denial of Wide Awake's application constituted viewpoint discrimination. *Id.* at 832. This Court found that the state may reserve a forum for certain groups or topics, but once the university opens a metaphysical forum for student speech, it may not "exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of viewpoint." *Id.* at 829. The university did not exclude religion as a subject matter in the forum, but excluded religious viewpoints on every topic. *Id.* at 831. The Court rejected any distinction between religious speech and speech about religion, finding it lacks "intelligible content." *Id.* at 845 (citing *Widmar*, 454 U.S. at 269 n.6). The Court also rejected the university's plea that economic scarcity justified its exclusion of religious activities, as viewpoint discrimination cannot be justified on that basis. Nor did the Court accept the university's assertion that it would violate the Establishment Clause by funding religious activities, because private individuals were speaking and the guarantee of government neutrality toward religion is respected, not offended, when the government extends access to a forum for broad and diverse ideologies. *Id.* at 839, 842.

In *Southworth*, students at the University of Wisconsin challenged the state's ability to extract a mandatory student fee from them that was used to fund RSOs with which the students disagreed. 529 U.S. 217. The student "speech the University [sought] to encourage in the program" was "distinguished not by discernable limits but by its vast, unexplored bounds." *Id.* at 232. Like Badger Catholic's case, RSOs did not receive lump-sum payments of cash, but obtained funding by submitting receipts and invoices. *Id.* at 225. This Court determined that the mandatory fee created a forum for private student speech, not University speech. *Id.* at 229. Thus, this Court rejected the students' request to strike down the mandatory fee, but conditioned operation of the fee system on the university allocating the fee to RSOs on a viewpoint neutral basis. *Id.* at 230.

The Seventh Circuit's decision correctly applied the foregoing precedent and held that the University discriminated against Badger Catholic by denying it student activity fee funding for any activity the University determined contained too much student-led prayer, worship, or proselytizing.

First, the Seventh Circuit determined that *Widmar* and *Rosenberger* both held that the University does not violate the Establishment Clause by funding Badger Catholic's programs. App. 4-5a. The "University of Missouri contended, just as the University of Wisconsin has done, that any subsidy to worship would violate the Establishment Clause." App. 5a. But "[a]s long as the University makes facilities equally available to secular and

sectarian groups . . . there is no constitutional problem." *Id.* Thus, Cornerstone, like Badger Catholic here, "was entitled to a room where its members could meet, pray, sing hymns, and proselytize." *Id.*

The court recalled that in *Rosenberger*, the University of Virginia argued there is a difference between providing access to facilities and reimbursing a religious speaker's expenses. App. 6a. However, the Seventh Circuit found that this Court rejected that theory and "reiterated *Widmar*'s conclusion that withholding support of religious speech when equivalent secular speech is funded is a form of forbidden viewpoint discrimination. *Id.* The "University of Wisconsin itself persuaded the Supreme Court [in *Southworth*] to hold that dissatisfied students are not entitled to get their student-activity fees back precisely because the fees are used to operate a public forum in which students themselves, and not the University, decide what is to be said." App. 10a.

The University argues that this case presents "special Establishment Clause dangers" of making "direct money payments to sectarian institutions." Pet. 30 (citing *Rosenberger*, 515 U.S. at 842). But the University argues from a false premise. The record shows—and Petitioners overlook—that the University does not make "direct money payments" to Badger Catholic. RSO activities are funded by paying contractors directly, use of the University credit card, or reimbursement to individual students. A-Ap.200 ¶¶118-19. The concern identified in *Rosenberger* is not present in this case. Further,

Badger Catholic is not a "sectarian institution," it is a student group. *Widmar* and *Rosenberger* held there were no Establishment Clause dangers in providing in-kind or monetary support to those groups. Nor is there a danger with Badger Catholic.

Second, the Seventh Circuit held that *Widmar* and its progeny forbid the University from excluding any otherwise permissible Badger Catholic activity that features student-led prayer, worship, or evangelism. App. 8a. Noting that a university can define the kind of extracurricular activities it chooses to promote, the Seventh Circuit found that "the University of Wisconsin has chosen to pay for student-led counseling," like Badger Catholic's Busy Persons Retreat and Samuel Group. App. 8a. The religious meetings in *Widmar* parallel the content of Badger Catholic's activities here: "offering of prayer," "singing of hymns in praise and thanksgiving [worship]," "sharing of personal views and experiences (in relation to God) by various persons [evangelism, or as the University calls it, 'proselytizing']," "exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles [inculcation of religious beliefs]," and "an invitation to the interested to meet for a personal discussion [proselytizing]." *Chess v. Widmar*, 635 F.2d 1310, 1313 (8th Cir. 1980), *aff'd* 454 U.S. 263 (1981). Badger Catholic's programs were nearly identical. For example, the Alpha-Omega event was a weekly speaker series and large meeting of students that included worship and sometimes proselytizing and prayer. A-Ap.236-37 ¶208; 310-11 ¶456. The Evangelical Catholic Institutes were leadership

training events that included opportunities for worship, prayer and proselytizing. A-Ap.234-36 ¶207; 312-14 ¶460. Thus, the University's denial of funding to Badger Catholic discriminates against religious modes of expression conveying religious viewpoints on permitted forum topics. *See CLS*, 130 S. Ct. at 2987 (describing *Widmar*'s holding as that the refusal to allow "religious worship and discussion" in a public forum is viewpoint discrimination).

Petitioners contend the Seventh Circuit held they cannot refuse to fund pure religious worship. Pet. 27. In actuality, the court held that because the University funds counseling, leadership training, tutoring and other activities from a secular perspective, it cannot refuse to fund these same activities conducted by Badger Catholic solely because the activities might include religious modes of speech. App. 8a. Nor did Badger Catholic request funds for "pure religious worship." Badger Catholic's GSSF budget included funds for travel expenses, conference fees, printing costs, speakers, and meals. A-Ap.234-36 ¶¶206-07; 311-14 ¶¶457, 460. "Pure religious worship" is not at issue.

Finally, the court withheld its decision until this Court decided *CLS* to see whether this Court would modify the approach articulated in *Widmar*, *Rosenberger*, and *Southworth*. App. 11a. This Court left that approach in place. Thus, the Seventh Circuit had "no doubt" that the University "must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed." App. 12a.

The Seventh Circuit correctly applied this Court's holdings in *Widmar*, *Rosenberger*, and *Southworth*. Each of these rulings refute the University's justifications for discriminating against Badger Catholic. By allocating mandatory student activity fees to RSOs for a broad range of expressive activities, the University created a public forum for private student speech. Having created such a forum and allowing students to engage in counseling, leadership training, advocacy, and many other activities, the University engaged in unconstitutional discrimination by refusing to fund any Badger Catholic activity that included too much of what the University defined as student-led prayer, worship, or "proselytizing."

### B. The Government May Not Choose to Exclude Religious Viewpoints from a Forum.

Although the University's main defense in the District Court was that funding Badger Catholic would violate the Establishment Clause, it shifted gears at the Seventh Circuit (and in the Petition), to claim that *Locke v. Davey*, 540 U.S. 712 (2004), permits the University to withhold funds from religious speakers in a public forum. The Seventh Circuit considered and rejected this improper application of *Locke*. App. 8a. The University also claims that its discretion in regulating its forum provides a defense here, a notion this Court has rejected firmly.

The University asserts that *Locke* permits it to refuse to fund certain types of religious expression.

But the University misreads *Locke* to permit a public university to gerrymander its forum to single out religious expression opened generally for student speech. *Locke* did not overrule *Widmar*, *Rosenberger*, and *Southworth* and does not justify the University's policies here.

*Locke* concerned a college scholarship program, funded by taxes, that students could use for any degree, except degrees in theology. 540 U.S. at 716. This Court considered whether pursuant to Washington's state constitution, which prohibited even indirect funding of religious instruction, the state could exclude theology degrees from the program without violating the Free Exercise Clause of the federal constitution. *Id.* at 719. This Court upheld the restriction, but limited its holding to the specific facts of the case.

The Seventh Circuit correctly distinguished *Locke* from this case on two grounds. First, in *Locke*, the state's program did not evince hostility toward religion, as the scholarship could be used at pervasively sectarian colleges where prayer and religious instruction were part of the program, but not to train for the ministry. App. 9a. Unlike Washington, the University prohibits the use of the funds for student-led prayer or religious instruction, which singles out and shows hostility toward religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (holding regulation of conduct undertaken for religious reasons violates the Free Exercise Clause).

Second, the scholarship program in *Locke* was government speech, which is why this Court "declared that public-forum analysis was 'simply inapplicable.'" App. 9-10a (citing *Locke*, 540 U.S. at 720 n.3). By contrast, the University is not "propagating its own message;" rather, it created a public forum for private student speech and must honor the choices of those private speakers to engage in religious expression. App. 10a. The Seventh Circuit's conclusion on this point is correct, because if *Locke* applied to speech fora, it would effectively overrule *Southworth* and *Rosenberger*, which it clearly did not do.

Despite this, the University argues it must exclude religious speech because Wisconsin's constitution makes the University's mission secular in nature,[4] and because the SUF is deposited in state coffers, the use of those funds cannot violate the state constitution. Pet. 31. These same facts were present in *Southworth* and did not change this Court's conclusion that the University must provide viewpoint neutral access to SUF. *See Southworth*, 529 U.S. at 222. In addition, the allocable student fees, regardless of whether they enter state coffers, belong wholly to the students, not the state. *See Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring) (finding the student activity fund "represents not government resources," "but a fund that simply belongs to the students"); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (citing with authority Justice O'Connor's

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[4] The University never raised this state constitutional defense in the District Court.

*Rosenberger* concurrence describing the private nature of the SUF).

Contrary to the Petition, the University does not permit RSOs to use the SUF funds only for activities that "promote the mission of the institution." Pet. 32. The University makes the SUF money available to fund as much expressive activity as possible. *See Southworth*, 529 U.S. at 232 ("The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds.").

The Seventh Circuit also correctly rejected the University's plea that it is entitled to "discretion" in determining which RSO activities violate its view of the Establishment Clause. Pet. 32. The courts "owe no deference to universities when" they consider "the question whether a public university has exceeded constitutional constraints." *CLS*, 130 S. Ct. at 2988. The University's decision to exclude student speech with religious content from the forum of funding is not a question of educational policy warranting deference by the courts; it is a question of constitutional permissibility. The University repeatedly invokes the Establishment Clause as justifying its policy of speech exclusion. But universities have no special expertise to determine constitutional questions. Courts are the experts on those questions. Nor has the University ever expressed a pedagogical reason for excluding religious expression from the wide-open forum. Indeed, for the University to parse which student speech qualifies as "worship" or "proselytizing" is not "discretion" but rather excessive entanglement with

religion in violation of the Establishment Clause.[5] The University has rested its defense on providing a legal reason to exclude Badger Catholic—the Establishment Clause—and the Seventh Circuit properly rejected that reason based on this Court's precedent.

### C. This Court Has Already Considered and Rejected Distinctions Between Religious Speech and Speech from a Religious Viewpoint.

As the Seventh Circuit correctly concluded, this is not a "mere" religious worship case. However, even if it was, the Court should deny certiorari because the Court has already considered and rejected a distinction between religious worship and speech from a religious viewpoint. Further, the Petition's reliance on federal statutes that make a distinction between religious speech and speech from a religious viewpoint is irrelevant.

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[5] The Petition states that the University relied on Badger Catholic's own descriptions of its activities in determining, for example, whether they were "worship." But this is both irrelevant and inaccurate. First, the theological categories Badger Catholic uses to label its expression do not determine how it is categorized under First Amendment law. Second, the University independently reviewed and refused to fund a number of activities before it met with Badger Catholic, so the University entangled itself with religion by examining each activity and deciding whether it was too religious. The only Establishment Clause violation here is the University's efforts to parse through the speech of Badger Catholic to determine whether it is forbidden "worship" and "proselytizing" or not.

The record shows that Badger Catholic did not engage in "mere" religious worship, prayer, and proselytizing, nor did its GSSF budget include funding for "mere" religious activity. Rather, Badger Catholic's budget included funding for speaker honoraria, travel costs, printing, advertising, supplies, and registration fees. A-Ap.234-37 ¶¶206-08; 310-14 ¶¶455-57, 459-60, 462. These costs were associated with student counseling, leadership training, educational materials, and large group speaker events. While student-led prayer, worship, and proselytizing may have occurred during those activities, each of the disputed activities had secular counterparts in other RSO activities.

Badger Catholic's activities included student-led prayer, worship, and evangelistic speech, but this Court has "not excluded from free-speech protections religious proselytizing, . . . or even acts of worship." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). Nor has this Court distinguished between religious viewpoints and "religious worship." In fact, *Widmar* reached the opposite conclusion and found that the university "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." 454 U.S. at 269. A distinction between religious worship and speech from a religious viewpoint "lacks a foundation in either the Constitution or in our cases, and is judicially unmanageable." *Id.* at 271 n.9.

Further, a distinction between religious viewpoints and "religious worship" is unintelligible and unworkable. In *Rosenberger*, Wide Awake sought to proselytize the University of Virginia campus through its newspaper. *See* 515 U.S. at 867 (Souter, J., dissenting) (finding the magazine "is [a] straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ"); *see also id.* at 826. Nevertheless, this Court, relying on *Widmar*, found that there can be no distinction between religious speech and speech about religion:

> [T]he dissent fails to establish that the distinction between religious speech and speech about religion has intelligible content. There is no indication when singing hymns, reading scripture, and teaching biblical principles cease to be singing, teaching, and reading—all apparently forms of speech, despite their religious subject matter—and become unprotected worship.

*Id.* at 845 (citing *Widmar*, 454 U.S. at 269 n.6) (quotation marks omitted).

Similarly, in *Good News Club*, a Christian club sought to use the school facilities for prayer, worship, proselytizing and religious instruction. 533 U.S. at 103 (majority), 137-38 (Souter, J., dissenting). In comparing the Good News Club to

Lamb's Chapel,[6] the Court found that the only difference between the two "is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a "religious viewpoint" and the exclusion of either constituted viewpoint discrimination. *Id.* at 109-10. Thus, not only did this Court not find a difference between "religious viewpoint" and "religious worship," it rejected the distinction.

As the Seventh Circuit appropriately noted, the unintelligible nature of the University's distinction is easily illustrated by example. The panel wondered if the University would lodge the same objections to funding an RSO "comprising members of the Society of Friends. Quakers view communal silence as religious devotion, and discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does." App. 11a. The difference between "religious worship" and religious viewpoints is merely the mode of speech employed to communicate the religious viewpoint. Any other distinction lacks intelligible content and lies beyond the University's ability to administer without entangling itself in religion. *See Widmar*, 454 U.S. at 269 n.6.

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[6] In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), this Court held that a school committed viewpoint discrimination by preventing a church from using its facilities to show a Christian parenting film.

Petitioners claim *Good News Club*, *Rosenberger*, and *Lamb's Chapel* reserved for consideration the question of whether the government must permit a religious group's worship or evangelism in a public forum. Pet. 13-14 & n.10. However, neither the holdings of those cases nor the quotations extracted by Petitioners support that conclusion, especially in light of the clear holding of *Widmar*. As the quotes in the Petition indicate, this Court concluded that the parties did not raise whether the First Amendment protects "mere religious worship" in a public forum. Nor does this case involve "mere religious worship," as each of Badger Catholic's activities have other purposes as their main venture—leadership training, counseling, education—but include prayer, worship, and evangelistic speech as modes of expression during the activities.

Finally, Petitioners argue a difference exists between religious worship and speech from a religious perspective because Congress recognizes such a difference in federal law. However, the federal statutes cited by Petitioners do not involve speech fora. Petitioners claim this is "unimportant," yet fail to articulate a reason why. Pet. 36. In fact, the lack of a government speech forum in each statute is dispositive. When the government creates a program and funds private actors to advance that program, the Speech Clause does not impose the same restrictions on the government as when it opens a forum for private expression. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991). But the Petition "does not raise the issue" of the "state-

controlled University's right to use its own funds to advance a particular message." *Southworth*, 529 U.S. at 229. When the government is speaking, on its own accord or through others, the Establishment Clause binds its actions. *Summum*, 129 S. Ct. at 1131-32. But the Establishment Clause does not impose comparable restrictions upon private speech as the University has done here. *Rosenberger*, 515 U.S. at 841.

As the Seventh Circuit noted, the University convinced this Court in *Southworth* that students are not entitled to a refund of the mandatory student fee because the University will allocate it on a viewpoint neutral basis to foster a broad spectrum of private student speech in its forum. App. 2a. The University now asks this Court to approve its desire to renege on its viewpoint neutral promise and exclude religious speech. App. 3a. The court of appeals properly rejected that request.

## II. There Is No Conflict Among the Circuits Warranting Certiorari.

Petitioners contend the decision below created a circuit split between the Seventh Circuit on one hand and the Second and Ninth Circuits on the other. Pet. 19. However, the Seventh Circuit's decision is consistent with other circuits that have confronted the issue of private religious speech in public fora. By contrast, the Second Circuit has yet to conclude its examination of the issue, and the Ninth Circuit's decision is an outlier, which ultimately, when on remand, did not preclude the worship at issue.

### A. The Seventh Circuit's Decision Is Consistent with its Sister Circuits.

The Seventh Circuit's decision comfortably fits with the decisions from the First, Third, Fourth, Fifth, Eighth, and Tenth Circuits that the government violates the First Amendment when it excludes private religious expression, including worship and proselytizing, from fora opened generally for private expression. All of those courts have rejected the argument that the Establishment Clause requires the government to exclude private religious expression from such fora.

In *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45, 47 (1st Cir. 1991), the First Circuit, including then-Chief Judge Breyer, held that a school district created a designated public forum when it opened its buildings for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs, and cultural events, and struck down its exclusion of a church that applied to use the facilities for a free Christmas meal that included prayer and religious preaching.

In *Gregoire v. Centennial School District*, 907 F.2d 1366, 1373 (3d Cir. 1990), the Third Circuit held that a school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by an illusionist.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), the Fourth Circuit declared unconstitutional a school district's policy that required churches conducting worship services to pay more than nonreligious groups to rent school buildings for their expression.

In *Concerned Women for America v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989), the Fifth Circuit held that a public library violated the First Amendment by excluding a woman's prayer group from meeting in the library's auditorium based on a policy that excluded religious expression from an otherwise generally open designated public forum.

Prior to reaching this Court, the Eighth Circuit in *Widmar*, 635 F.2d 1310, ruled that the University of Missouri violated the First Amendment by excluding the Cornerstone student organization from meeting in its generally open facilities for the purpose of religious worship.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), the Tenth Circuit ruled that the City of Albuquerque violated the First Amendment with its policy excluding religious worship and sectarian instruction from the forum it created at its senior centers, and by denying a local church access to the centers to show a film that proselytized people to convert to the Christian faith.

The Seventh Circuit's decision follows not only the decisions of this Court, but also those of its sister circuits, all of which have held that the government violates the First Amendment when it excludes

otherwise eligible speakers from a forum because they want to use religious modes of expression. The Seventh Circuit's decision does not create a circuit split; rather, it fits quite comfortably among its peers in declaring the University's policy unconstitutional. Therefore, this Court should deny the petition to review this case.

### B. The Second Circuit's Controlling Decision in *Bronx Household of Faith II* Supports the Seventh Circuit's Decision Below.

As Petitioners admit, the Second Circuit's decisions in *Bronx Household of Faith v. Board of Education of the City of New York* have resulted in three rulings with "fractured" reasoning. Pet. 15. *See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10* ("*Bronx Household I*"), 127 F.3d 207 (2d Cir. 1997) (affirming dismissal of plaintiff's complaint); *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx Household II*"), 331 F.3d 342 (2d Cir. 2003) (affirming preliminary injunction against policy excluding "religious worship and religious instruction" from public school facility forum); *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx Household III*"), 492 F.3d 89 (2d Cir. 2007) (per curiam) (vacating permanent injunction and remanding due to a change in policy). A fourth decision is forthcoming. *See Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, No. 07-5291 (2d Cir., argued Oct. 6, 2009).

The *Bronx Household* cases involve a school district that denied a church's request to rent space

for Sunday morning meetings pursuant to a policy prohibiting "religious services or religious instruction." 331 F.3d at 346-47. The church's meetings include singing Christian hymns and songs, prayer, fellowship, Biblical preaching and teaching, and communion, among other things. *Id.* at 347.

Petitioners wrongly rely on a concurrence from Judge Calabresi in *Bronx Household III*, which was a per curiam decision "without a rationale to which a majority of the court agrees."[7] 492 F.3d at 91. However, *Bronx Household II* is the currently controlling decision, not the concurring opinion from *Bronx Household III* that the University cites.

The Second Circuit's decision in *Bronx Household II*, which the University ignores, supports the Seventh Circuit's decision in this case. In *Bronx Household II*, the Second Circuit likened the case to *Good News Club* and affirmed a preliminary injunction against the school policy. 331 F.3d at 354, 356. Because the school opened its facilities for groups to teach morals and character development, its exclusion of the church constituted viewpoint discrimination. *Id.* The court found that *Good News Club* "seriously undermined" the idea that a distinction can be made between religious worship

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[7] While Judge Calabresi's concurrence expresses the opinion that religious worship may be distinct from religious speech, none of the other judges on the panel endorsed that opinion. Moreover, this Court has rejected the distinction between religious speech and worship offered by Judge Calabresi. *See Widmar*, 454 U.S. at 271 n.9.

and other forms of speech from a religious viewpoint. *Id.* at 355.

Petitioners' reliance on *Bronx Household III* for the proposition that the circuits disagree on this issue is not only misguided due to its lack of a unified decision, but is also completely undermined because the case is yet unresolved. As it now stands, the Seventh Circuit's decision is in agreement with the controlling decision of *Bronx Household II*.

### C. The Ninth Circuit's *Faith Center* Decision Is an Outlier.

The Ninth Circuit's decision in *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), does not warrant review either. *Faith Center*'s holding is contrary to the precedent of this Court and the courts of appeals, and was only a ruling on a preliminary injunction that did not ultimately prevent the religious speaker from prevailing in the end. On remand, the District Court in *Faith Center* ruled that the public library had violated the First Amendment by excluding a worship service from its forum for private expression.

In *Faith Center*, a church applied to use the county's library meeting rooms for discussion of cultural and community issues from a religious perspective, as well as prayer and worship. *Id.* at 903. The Ninth Circuit held that a county library's policy of excluding "religious services" from its meeting rooms was a reasonable and permissible content-based restriction in a limited public forum

that did not violate the First Amendment. *Id.* at 911. The court reasoned that many of Faith Center's activities were permitted in the forum because other groups conducted similar activities, but Faith Center's meeting for "pure religious worship" was not permitted because of the limited character of the forum and because religious worship does not communicate a viewpoint.[8] *Id.* at 916.

However, on remand, the District Court declared unconstitutional the policy excluding the church's worship service. The District Court permanently enjoined the library's policy because it entangled the government excessively with religion in violation of the Establishment Clause. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. C 04-03111, 2009 WL 1765974, *8 (N.D. Cal. June 19, 2009). The University in this case engages in the same sort of excessive entanglement with its minute examination of each component of every Badger Catholic activity to determine whether they contain University-forbidden "worship," "prayer," or "proselytizing," or permitted "religious speech." The University excessively entangles itself with religion in the same way that the District Court in *Faith Center* found that the public library did.

The Ninth Circuit's conclusion that religious worship does not communicate a viewpoint is not

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[8] The Ninth Circuit found that the library could not exclude Faith Center's proselytizing speech, as that was similar to advocacy of other groups. *Id.* at 918. Similarly, the Seventh Circuit held the University may not exclude Badger Catholic's proselytizing because other RSOs advocate ideas with SUF money.

only illogical, but contrary to *Good News Club* and *Widmar*. As previously discussed, religious worship receives the same amount of protection under the First Amendment as other modes of religious expression. *See Good News Club*, 533 U.S. at 109-10; *Widmar*, 454 U.S. at 269 n.6. Religious worship, prayer, or proselytizing are merely modes of speech that communicate an idea or viewpoint. This Court has not differentiated between the communication of religious viewpoints and prayer, worship, and proselytizing.

*Faith Center* is also an outlier among courts of appeals that have examined government restrictions on religious expression in a public forum. First, the Ninth Circuit acknowledged that the "unique factual circumstances" of the library forum "set this case apart from the cases primarily relied upon by Faith Center." *Faith Ctr.*, 480 F.3d at 916 (citing, e.g., *Good News Club*, 533 U.S. at 103, and *Bronx Household II*, 331 F.3d at 345). The speech forum in *Faith Center* excluded most speech topics and only allowed use of the library for limited purposes. Petitioners argue they "attempt[ed] to draw the same line permitted" in that case, Pet. 15, but this is demonstrably false. The University's forum includes virtually every topic of speech. *Southworth*, 529 U.S. at 232.

The University excludes only religious expression conveyed in the modes of speech known as prayer, worship, and proselytizing. Students can advocate, as WISPIRG does, just not for religious ideas (proselytizing). Students can praise nature or cultural figures with words and celebration, as

Wunk Seek does, but not if that praise is directed toward a Western concept of God (worship). And students can counsel each other, but not if that counseling includes asking God for guidance (prayer). The Seventh Circuit's decision involves a completely different forum than *Faith Center* and correctly followed the precedent of this Court and its sister courts of appeals.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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